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Attorneys for Defendant
SENORX, INC.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HOLOGIC, INC., CYTYC CORP. and
HOLOGIC L.P.,

Plaintiffs,

v.

SENORX, INC.,

Defendant.

) Case No. 08-CV-0133 RMW

) **REPLY IN SUPPORT OF DEFENDANT**
) **SENORX, INC.'S OBJECTIONS TO**
) **AND MOTION TO STRIKE IMPROPER**
) **DOCTRINE OF EQUIVALENTS**
) **ARGUMENT**

) Date: June 25, 2008
) Time: 2:00 p.m.
) Courtroom: 6, 4th Floor
) Judge: Hon. Ronald M. Whyte

1 trial is scheduled to begin in less than three weeks. Plaintiffs have not explained how SenoRx
2 could possibly be expected to defend itself against new infringement contentions at this stage in
3 the case.

4 Third, Plaintiffs offer no explanation for their failure to assert infringement under the
5 doctrine of equivalents in their preliminary contentions. They do not dispute that they have
6 learned no new information about the Contura since serving those contentions. Nor do they
7 explain why the claim elements at issue are different from claims for which Plaintiffs did offer
8 alternative theories of infringement. For instance, Plaintiffs asserted that the claims involving an
9 inner spatial volume were infringed either literally or under the doctrine of equivalents. Indeed,
10 given the schedule of this case, that is the only framework that makes sense. SenoRx's expert
11 reports and Preliminary Invalidity Contentions addressed both parties' claim constructions.
12 There is no excuse for Plaintiffs not to have done the same.

13 Finally, Plaintiffs cannot possibly maintain that they would be surprised if this Court
14 were to rule that terms claiming "a plurality of radioactive solid particles" (claim 12) and "a
15 plurality of solid radiation sources" (claim 17) actually require a plurality of solid particles or
16 solid radiation sources. Indeed, Plaintiffs' own proposed construction was that these terms
17 should receive their "plain meaning." Knowing that the Contura never used more than one
18 radioactive source, Plaintiffs made the express and volitional decision to only assert literal
19 infringement of these claims. To relieve them of the consequences of that decision less than
20 three weeks before trial and after the close of discovery in this case is contrary to this District's
21 Local Rules and would unfairly prejudice SenoRx.

22 CONCLUSION

23 For the foregoing reasons, SenoRx respectfully requests that the Court strike argument
24 regarding the doctrine of equivalents from Plaintiffs' Opposition to SenoRx's Motion for Partial
25 Summary Judgment of Non-Infringement (pages 18-21), and prevent Plaintiffs from changing
26 their theories of infringement at this stage of the case.

1 In addition, Plaintiffs state that they intend to assert new infringement contentions on
2 claim terms in which the Court does not adopt their proposed construction. Pls.' Opp. 6-7 nn.3-
3 4. For the same reasons discussed above, it is simply too late to allow Plaintiffs to assert new
4 contentions without severely prejudicing SenoRx, and the Court should deny any such request.
5 The only alternative would be to continue the trial to provide SenoRx an opportunity to develop
6 and present a defense to these new contentions.

7
8 Dated: June 23, 2008

9 Respectfully submitted,

10
11 By: /s/ F.T. Alexandra Mahaney
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Attorneys for Defendant
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CERTIFICATE OF SERVICE

U.S. District Court, Northern District of California,
Hologic, Inc. et al. v. SenoRx, Inc.
Case No. C-08-0133 RMW (RS)

I, Kirsten Blue, declare:

I am and was at the time of the service mentioned in this declaration, employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 12235 El Camino Real, Ste. 200, San Diego, CA, 92130.

On June 23, 2008, I served a copy(ies) of the following document(s):

**REPLY IN SUPPORT OF DEFENDANT SENORX, INC.'S OBJECTIONS TO
AND MOTION TO STRIKE IMPROPER DOCTRINE OF EQUIVALENTS
ARGUMENT**

on the parties to this action by the following means:

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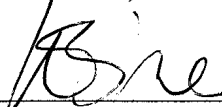
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District of California.

8 I declare under penalty of perjury under the laws of the United States that the above is true
9 and correct, and that this declaration was executed on June 23, 2008.

10 

11 Kirsten Blue